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INSANITY AND CRIMINAL RESPONSIBILITY

A TREATISE on the Criminal Responsibility of Lunatics published in England in 1909 begins with this statement:

"The feud between medical men and lawyers in all questions concerning the criminal liability of lunatics is of old standing. More than one authority on either side has tried to bring about a reconciliation between the contending parties. But their endeavours have been crowned with very little success. For though it cannot be denied that the strife and warfare has of late lost much of its former bitterness, a *modus vivendi* satisfactory to both parties has not been found." [1]

A year after this statement was made Professor John H. Wigmore, then president of the American Institute of Criminal Law and Criminology, believing that some agreement might result from the combined and coöperative labors of members of the two professions and that the difficult problem of determining the relation of insanity to criminal responsibility might be thereby to some extent solved, appointed a committee composed of four physicians and five lawyers.[2] This committee, which has had a continuous existence since its original appointment, published yearly reports,

[1] OPPENHEIMER, CRIMINAL RESPONSIBILITY OF LUNATICS, Preface.

[2] Two members of the original committee resigned, and one vacancy thus created was later filled. Otherwise the committee has remained unchanged since its original appointment. It now consists of the following members:

Albert C. Barnes, Judge of the Superior Court, Chicago.
Orrin N. Carter, Justice of the Illinois Supreme Court.
Edwin R. Keedy, *Chairman*, Professor of Law in the University of Pennsylvania.
Adolf Meyer, Professor of Psychiatry in Johns Hopkins Medical School.
William E. Mikell, Dean of the Law School, University of Pennsylvania.
Harold N. Moyer, Physician, Chicago.

one of them being a compilation of the laws of all the states of this country relative to insanity and criminal responsibility. It also at various times suggested for discussion tentative proposals, some of which were finally recommended for adoption. In 1915 the committee presented a bill for the regulation of expert testimony in cases where insanity is set up as a defense to a criminal charge. This bill was approved by the Institute of Criminal Law and Criminology, and by the Conference on Medical Legislation of the American Medical Association. Last year the committee, having reached a unanimous agreement, presented to the Institute a bill providing a test for determining criminal responsibility when the defense of insanity is raised, and a method of procedure to be employed in such a case. This bill was approved by the Institute, which also at the request of the committee approved several sections of the expert testimony bill independently of the others. The two bills as finally approved are as follows:

Criminal Responsibility Bill

Sec. 1. *When Mental Disease a Defense.* No person shall hereafter be convicted of any criminal charge when at the time of the act or omission alleged against him he was suffering from mental disease and by reason of such mental disease he did not have the particular state of mind that must accompany such act or omission in order to constitute the crime charged.

Sec. 2. *Form of Verdict.* When in any indictment or information any act or omission is charged against any person as an offense, and it is given in evidence on the trial of such person for that offense that he was mentally diseased at the time when he did the act or made the omission charged, then if the jury before whom such person is tried concludes that he did the act or made the omission charged, but by reason of his mental disease was not responsible according to the preceding section, then the jury shall return a special verdict that the accused did the act or made the omission charged against him but was not at the time legally responsible by reason of his mental disease.

Sec. 3. *Inquisition.* When such special verdict is found, the court shall remand the prisoner to the custody of [the proper officer [3]] and shall immediately order an inquisition by [the proper persons [3]] to determine

Morton Prince, Physician, Boston.

William A. White, Superintendent Government Hospital for the Insane, Washington, D. C.

[3] When this bill is introduced in the legislature of any state, the titles of the persons

whether the prisoner is at that time suffering from a mental disease so as to be a menace to the public safety. If the members of the inquisition find that such person is mentally diseased as aforesaid, then the judge shall order that such person be committed to the state hospital for the insane, to be confined there until he shall have so far recovered from such mental disease as to be no longer a menace to the public safety. If they find that the prisoner is not suffering from mental disease as aforesaid, then he shall be immediately discharged from custody.

Expert Testimony Bill

Sec. 1. *Summoning of Witnesses by Court.* Whenever in the trial of a criminal case the issue of insanity on the part of the defendant is raised, the judge of the trial court may call one or more disinterested qualified experts, not exceeding three, to testify at the trial, and if the judge does so, he shall notify counsel of the witnesses so called, giving their names and addresses. Upon the trial of the case, the witnesses called by the court may be examined regarding their qualifications and their testimony by counsel for the prosecution and defense. Such calling of witnesses by the court shall not preclude the prosecution or defense from calling other expert witnesses at the trial. The witnesses called by the judge shall be allowed such fees as in the discretion of the judge seem just and reasonable, having regard to the services performed by the witnesses. The fees so allowed shall be paid by the county where the indictment was found.

Sec. 2. *Written Report by Witnesses.* When the issue of insanity has been raised in a criminal case, each expert witness, who has examined or observed the defendant, may prepare a written report regarding the mental condition of the defendant based upon such examination or observation, and such report may be read by the witness at the trial after being duly sworn. The written report prepared by the witness shall be submitted by him to counsel for either party before being read to the jury, if request for this is made to the court by counsel. If the witness presenting the report was called by the prosecution or defense, he may be cross-examined regarding his report by counsel for the other party. If the witness was called by the court, he may be examined regarding his report by counsel for the prosecution and defense.

Sec. 3. *Commitment to Hospital for Observation.* Whenever in the trial of a criminal case the existence of mental disease on the part of the accused, either at the time of the trial or at the time of the commission

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whose duty it is, according to the existing law of the state, to conduct such an inquisition, shall be inserted here. It is not proposed to change the prevailing practice in this respect.

of the alleged wrongful act, becomes an issue in the case, the judge of the court before whom the accused is to be tried or is being tried shall commit the accused to the State Hospital for the Insane, to be detained there for purposes of observation until further order of court. The court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for purposes of observation. The court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the accused. This report may be introduced in evidence at the trial under the oath of said chief physician, who may be cross-examined regarding the report by counsel for both sides.

These bills were discussed editorially in a recent number of the HARVARD LAW REVIEW.[4] The editor expressed approval of them with the exception of the first section of the bill relating to criminal responsibility, which he adversely criticized. At the request of the present writer, the editor-in-chief of the REVIEW kindly gave him this opportunity to reply to these criticisms.

The section criticized reads as follows:

"No person shall hereafter be convicted of any criminal charge when at the time of the act or omission alleged against him he was suffering from mental disease and by reason of such disease he did not have the particular state of mind that must accompany such act or omission in order to constitute the crime charged."

This section was objected to on the following grounds:

I. "It neglects entirely the important and steadily growing class of crimes in which a specific intent is unnecessary." II. "It fails to cover the case of irresistible impulse, where the power of choice is negatived by the mental disorder." III. "The statute, according to its authors, will introduce the doctrine of partial responsibility, *i. e.* the holding of lunatics for part of their crimes." IV. "It is difficult to see wherein the proposed legislation would materially change the existing legal situation." V. "The previous rules, though less precise, were more complete."

I. The question presented by the first objection is whether the proposed test is limited to crimes which require a specific intent.

It is a fundamental principle of the criminal law that every crime, either common law or statutory, with the exception of public nuisances and breaches of what are commonly described as police

[4] Vol. 30, p. 179 (December, 1916).

regulations, includes a mental element. This necessary mental element has been variously named. In the familiar maxim it is "*mens rea.*" [5] Bracton calls it "*voluntas nocendi.*" [6] Lord Hale speaks of the "will to commit an offense." [7] Blackstone calls it "vicious will." [8] Austin uses "criminal knowledge." [9] The terms usually employed are "guilty mind" [10] and "criminal intent," [11] the latter being divided into general intent and specific intent. All of these terms are open to objection. "*Mens rea*" was said by Stephen, J., in *Regina* v. *Tolson*,[12] to be confusing and contradictory, because it is used to include so many dissimilar states of mind. On the other hand a recent English writer narrowly defines *mens*

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[5] *Actus non facit reum, nisi mens sit rea.* Pollock and Maitland state that the original source of this maxim is to be found in the sermons of St. Augustine, where the wording is "*Ream linguam non facit nisi mens rea.*" The maxim later appears in the *Leges Henrici* as "*Reum non facit nisi mens rea.*" Coke states it "*Et actus non facit reum nisi mens rea sit.*" 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 474, note.

[6] "*Crimen non contrahitur, nisi nocendi voluntas intercedat.*" 2 DE LEGIBUS ANGLIAE (Twiss ed.), 126.

[7] "Where there is no will to commit an offence, there can be no transgression." HALE, P. C., ch. 2.

[8] "An unwarrantable act without a vicious will is no crime at all." 4 BL. COMM. 21.

[9] "Every crime, therefore, supposes, on the part of the criminal, criminal knowledge or negligence." 3 AUSTIN, JURISPRUDENCE, 326.

[10] "The general rule of law is that a person cannot be convicted and punished in a proceeding of a criminal nature, unless it can be shown that he had a guilty mind." Field, J., in Chisholm *v.* Doulton, 22 Q. B. D. 736, 739 (1889).

"The second element which is essential to constitute a crime is what is called the *mens rea:* a 'guilty mind.'" CHERRY, OUTLINE OF CRIMINAL LAW, 8.

"An act cannot amount to a crime when it is not accompanied by a guilty mind." SHIRLEY, CRIMINAL LAW, 4.

[11] "Criminal intent is always essential to the commission of crime." Werner, J., in People *v.* Molineux, 168 N. Y. 264, 297, 61 N. E. 286 (1901).

"It is, therefore, a principle of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it cannot exist." BISHOP, NEW CRIMINAL LAW, § 287. Bishop in the same section uses "evil mind."

"It is a sacred principle of criminal jurisprudence that the intention to commit the crime is of the essence of the crime." Turley, J., in Duncan *v.* State, 7 Humph. (Tenn.) 148, 150 (1846).

"To constitute a criminal act, there must, as a general rule, be a criminal intent." Hoar, J., in Commonwealth *v.* Presby, 14 Gray (Mass.) 65, 66 (1859).

[12] 23 Q. B. D. 168, 185 (1889). "The maxim is recognized as a principle of English Law by all authorities, but the real difficulty arises, not as to the universality of its application, but as to its meaning. The '*mens rea*' generally means some *actively* guilty intention. It may, however, be mere negligence, if of a very gross description." CHERRY, OUTLINE OF CRIMINAL LAW, 8.

rea as "knowledge or neglect of available means of knowledge that one's act is, or may be, in contravention of the law of England." [13] "Will," as used by Hale and Blackstone, was probably a translation of the "*voluntas*" of Bracton and was equivalent to "intention." [14] "Guilty mind" is objectionable because it suggests moral turpitude. "Criminal intent" is not a satisfactory term to describe the mental element involved in every crime, (1) because, under the classification into general and special, "intent" has different meanings,[15] and (2) because the mental element in some crimes is negligence, which is inconsistent with the idea of "intent." All these terms have a common fault in seeming to imply that the mental state involved in crimes is a constant quantity, whereas, as is well known, it varies in different crimes. The malice aforethought of murder is different from the *animus furandi* of larceny, and this differs from the negligence required for involuntary manslaughter and the intent to burn necessary for arson. Some writers avoid the difficulty of giving a definite name to the mental element of crimes by saying that a certain state of mind is involved in the definition of every crime.[16] If then the section under discussion had simply said "state of mind" instead of "particular state of mind" no question as to its scope could possibly be raised — it would clearly cover every offense which includes any mental element. The question then is, whether the addition of the word "particular" has a narrowing effect. The word was used in its ordinary meaning of "pertaining

[13] STROUD, MENS REA, 20. Another definition is the following: "The *mens rea*, or guilty mind, of which the law speaks, is that mental state in which the actor, voluntarily doing an act, is conscious of the existence of facts, from which it follows as a matter of law that the thing done by him is an infraction of a duty or prohibition." G. A. Endlich, "The Doctrine of Mens Rea," 13 CRIMINAL LAW MAGAZINE, 831, 834.

[14] "It is not, however, a 'will' in Austin's sense of that word; but is closely akin to, and includes, his 'Intention.'" KENNY, OUTLINES OF CRIMINAL LAW, 37.

[15] "The general intent . . . is an intention to do the act done. . . . The specific intent is some independent mental element which must accompany the physical act in order that the crime in question may be committed." BEALE, CRIMINAL PLEADING AND PRACTICE, § 136.

"Intent [to kill] is defined as a steady resolve and deep-rooted purpose or design formed after carefully considering the consequences." Clark, J., in State *v.* Conly, 130 N. C. 683, 687, 41 S. E. 534 (1902).

[16] "The full definition of every crime contains expressly or by implication a proposition as to a state of mind." Stephen, J., in Reg. *v.* Tolson, 23 Q. B. D. 168, 187 (1889). "The state of mind which accompanies an act is often of legal consequence as forming an ingredient necessary for the attachment of certain consequences." 1 WIGMORE, EVIDENCE, § 242.

to a single thing," the idea being to limit the inquiry to the mental element involved in the crime charged and no other. This is no unusual use of the word in this connection. Russell discusses the "particular mental elements necessary to constitute particular crimes,"[17] and Kenny states that "every crime involves (1) a particular physical condition, . . . and (2) a particular mental condition causing this physical condition."[18] The phrase "the particular state of mind which must accompany such act or omission in order to constitute the crime charged" as used in the proposed section was meant to cover the mental element, whatever it may be and whatever it may be called, of the crime charged; and the foregoing discussion would seem to establish that this result was accomplished without in any way straining the accepted meaning of the words employed.

As examples of offenses in which no specific intent is necessary, and which according to his view are consequently not covered by the section, the editor mentions purchasing lottery tickets, dispensing liquor to minors, frequenting gambling dens and brothels, and statutory rape. He states that under the statute one who has a mania for committing these acts "would be unable to plead insanity and would apparently be sent to prison instead of to an insane asylum." So far as the writer knows, there is no reported case in which insanity has been set up as a defense to a charge of having committed any of these offenses. Even if some such cases have been overlooked, they are so few that the question whether they are covered by the proposed section is not of great practical importance. However, the question is of sufficient interest to deserve a serious discussion. Since the statute, as shown above, covers every offense, common law and statutory, which includes a mental element, the question whether it covers the offenses mentioned depends on whether any state of mind is included in their definition.

There are two classes of statutory prohibition which do not involve a specific intent. They are (1) those which require so-called general intent, as distinguished from specific intent, and (2) those in which the state of the mind of the doer is altogether immaterial. In a leading English case the latter group is divided

[17] 1 RUSSELL, CRIMES, 7 ed., 102.

[18] KENNY, OUTLINES OF CRIMINAL LAW, 37.

into three classes: (1) "Acts which are not criminal in any real sense, but which in the public interest are prohibited under a penalty," such as the innocent sale of adulterated food; (2) "public nuisances"; (3) "cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right." [19] The first class corresponds to what are generally called police regulations.[20]

Various reasons are given why no wrongful state of mind need be shown in such cases. Some of these reasons are: (1) that it would be difficult to secure convictions otherwise;[21] (2) that the purpose of such prohibitions is simply to protect the public from the doing of certain acts;[22] (3) that the legislature in enacting the statute has done away with the necessity for showing any state of mind on the part of the doer of the prohibited act.[23] The last of

[19] Wright, J., in Sherras *v.* De Rutzen, [1895] 1 Q. B. 918, 922.

[20] In State *v.* Rippeth, 71 Ohio St. 85, 87, 72 N. E. 298 (1904), a statute made it an offense to sell oleomargarine with coloring matter in it. Regarding this statute the court said: "This is a police regulation imposing a penalty irrespective of criminal intent."

"In statutory offenses created in the exercise of the police power, unless a wrongful intent or guilty knowledge, commonly designated by the use of the words 'willfully' or 'maliciously,' is made an essential element of the prohibited act, the violator may be convicted and punished, even if he has no design to disobey the law. . . . It is because of this familiar doctrine, inherent in the construction of statutes, which prohibit under a penalty acts and conduct which otherwise are not generally deemed unmoral or criminal, that convictions for the sale of liquor, where the seller had no just ground to believe it was intoxicating, or of imitation butter by the defendant's agent without a descriptive wrapper, which, though furnished, he failed from mere carelessness to use, or an inadvertent sale by the defendant's servant of milk not of standard quality, and the admission of a minor to a pool room where the defendant neither knew nor had any reason to believe that he was under age, have been sustained." Commonwealth *v.* N. Y. Cen. & H. R. R. Co., 202 Mass. 394, 396, 88 N. E. 764 (1909).

[21] "Laws forbidding the sale of intoxicating liquor and impure foods would be of little use, if convictions for their violations were to depend on showing guilty knowledge." People *v.* Hatinger, 174 Mich. 333, 335, 140 N. W. 648 (1913). A similar statement occurs in *In re* Carlson's License, 127 Pa. St. 330, 332, 18 Atl. 8 (1889).

[22] "The history of the milk legislation in this Commonwealth shows conclusively the determination of the lawmaking power to protect the community from adulterated or impure milk. The ultimate purpose is to have pure milk and to impose upon milk dealers the duty of seeing that the milk be such." Commonwealth *v.* Graustein, 209 Mass. 38, 42, 95 N. E. 97 (1911).

To the same effect see People *v.* D'Antonio, 134 N. Y. Supp. 657, 661 (1912).

[23] Lord Russell of Killowen said of a statute prohibiting the sale of adulterated milk: "This is one of the class of cases in which the Legislature has, in effect, determined that mens rea is not necessary to constitute the offence." Parker *v.* Alder,

these is the view usually taken. It must be carefully noted, however, that such legislative intent is rarely expressed in the statute. This fact was clearly pointed out by Wills, J., in *Regina* v. *Tolson*,[24] who said that the construction of the statute depends upon the nature and extent of the penalty attached, the subject matter of the enactment and the various circumstances which may make the one construction or the other reasonable or unreasonable. These are the tests usually employed in determining whether a mental element is involved in a statutory prohibition. If the penalty imposed is simply a fine and if the statute merely regulates for the public interest activities that apart from the statute are lawful and proper, then the penalty follows from the mere doing of the prohibited act [25] without regard to the state of mind of the doer.

The truth is that the statutory prohibitions under consideration, where the penalty is a fine, more nearly resemble torts than they do crimes.

"The mere fact of a *fine* no more shows that an indictment is a criminal proceeding than the ancient fine in trespass. The proceeding is substantially of a civil and not a criminal character, the distinction taken in the most ancient and approved authorities being, not whether the Crown is a party . . . but whether the real end or object of the proceeding is punishment or reparation." [26]

Where acts prohibited in the public interest are done, it may be well said that the fine imposed is less for the purpose of punishment than for reparation to the public for the harm done.

In deciding then whether insanity would be a defense, according to the provisions of the proposed section, to a prosecution for the statutory offenses mentioned by the editor, it is necessary to deter-

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[1899] 1 Q. B. 20, 25 (1898). See also People *v.* Roby, 52 Mich. 577, 579, 18 N. W. 365 (1884).

[24] 23 Q. B. D. 168, 174.

[25] "As regards the subject matter, it is generally where acts which in themselves are not morally wrong are forbidden, that the statute is interpreted so as to render an act which is done without any unlawful intention punishable. As regards the nature of the penalty, the question depends upon whether a fine only is imposed as a punishment, or whether an offender may also be liable to imprisonment. In the former case the statute is more likely to be interpreted strictly than in the latter." CHERRY, OUTLINE OF CRIMINAL LAW, 11.

"Most of the cases where ignorance or innocence of intention is no defense are cases punishable by fines." 9 HALSBURY, LAWS OF ENGLAND, 237, note *e*.

[26] Note to Reg. *v.* Paget, 3 F. & F. 29, 30 (1862).

mine in each case, by applying the usual tests, whether a mental element is involved.

One of the statutory prohibitions mentioned by the editor is selling liquor to minors. The penalties imposed in the different states for violation of such a statute vary greatly. In Massachusetts it is provided that the seller "shall forfeit one hundred dollars for each offence to be recovered by the parent or guardian of such minor in an action of tort." [27] The New York and California statutes prescribe a fine or imprisonment;[28] the Kansas statute, fine *and* imprisonment.[29] The usual penalty is simply a fine.[30]

According to the principles laid down, no guilty mind need accompany the doing of the prohibited act to make the defendant liable to the payment of a money penalty. Under a statute requiring imprisonment a punishable state of mind should be shown. Some few courts require this in all cases.[31] If a state of mind, such as "knowingly," is specified in the statute, this of course must be proved.[32] Where either fine or imprisonment may be imposed, the circumstances under which the act was done would very probably be taken into consideration by the judge in deciding between the two penalties, and it is most unlikely that one who violated the law while insane would be sent to prison.[33] It is, of course, true that if a statute imposing imprisonment as a penalty has been

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[27] REV. LAWS, 1902, 851.

[28] N. Y. PENAL CODE, § 484, (3); CAL. PENAL CODE, § 397 b.

[29] 2 GEN. STAT. 1897, 392, §§ 59, 60.

[30] ALA. CRIM. CODE, 1907, § 7354; COLO. REV. STAT. 1908, § 1812; CONN. GEN. STAT. 1902, §§ 2696, 2712; DEL. REV. CODE, 1852 as amended 1893, 414; KY. STAT. (CARROLL) 1915, § 1306; LA. ACTS, 1906, 154.

[31] Kreamer *v.* State, 106 Ind. 192, 6 N. E. 341 (1885); People *v.* Welch, 71 Mich. 548, 39 N. W. 747 (1888); State *v.* Sanford, 15 S. D. 153, 87 N. W. 592 (1901).

[32] Loeffler *v.* D. C., 15 App. D. C. 329 (1899).

[33] Though a few courts, notably Massachusetts, have held that a person may be convicted of bigamy (Commonwealth *v.* Mash, 7 Met. 472 (1844)) or adultery (Commonwealth *v.* Thompson, 11 Allen 23 (1865)) where the second marriage occurred under the mistaken belief that a former spouse was dead, this result probably would not have been reached if the defense had been insanity. The reasoning of Hoar, J., in Commonwealth *v.* Presby, 14 Gray 65 (1859), would seem to indicate this. The Mash and Thompson cases have been very severely criticized [1 BISHOP, NEW CRIMINAL LAW, 8 ed., § 303 a, note] and are opposed by the weight of authority. Apart from this, however, they do not present any difficulty in this connection, for under the proposed section insanity could be set up as a defense. The court recognizes that a punishable state of mind is necessary under the statutes, but holds that this was not negatived by the mistake.

construed, because of what is conceived to be the legislative intent, as not requiring any punishable state of mind, insanity would be no defense under the proposed section. The impropriety, if such it is deemed, of this result is due, not to any defect in the proposed section, but to the holding of the court that imprisonment may be imposed, in any case, upon a person who innocently violated the statute.

When, therefore, it has been determined that a punishable state of mind is required by the prohibitory statute, then under the section of the proposed bill insanity could be set up as a defense, and if by reason thereof the necessary state of mind is negatived the defendant should be acquitted. If, on the other hand, no state of mind is involved, the defendant would be convicted and would be required to pay the fine which the statute imposes. And why should not an insane person pay a pecuniary penalty in such cases just as he must pay damages for his private torts? [34] The language of Wills, J., in *Regina* v. *Tolson* is appropriate here:

"There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest." [35]

There is practically no difference except that of procedure between the prohibiting statutes which provide a fine and those which provide for recovery of a penalty in a civil action, and the grounds on which an insane person is held liable for his torts would seem to apply to both these cases.[36]

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[34] The liability of an insane person for torts is well settled. 1 HALE, P. C., 15; HAWK. P. C., ch. 1, § 5; BAC. ABR., Idiots and Lunatics, § E; Weaver *v.* Ward, Hobart 134; McIntyre *v.* Sholty, 121 Ill. 660, 13 N. E. 239 (1887); Cross *v.* Kent, 32 Md. 581 (1870); Morain *v.* Devlin, 132 Mass. 87 (1882); Feld *v.* Borodofski, 87 Miss. 727, 40 So. 816 (1905); Jewell *v.* Colby, 66 N. H. 399, 24 Atl. 902 (1890); Williams *v.* Hays, 143 N. Y. 442, 38 N. E. 449 (1894); Ward *v.* Conatser, 4 Bax. (Tenn.) 64 (1874); Morse *v.* Crawford, 17 Vt. 499 (1845).

It has been held that evidence of insanity is admissible in an action of slander in order to show the exact amount of the damage done to the reputation of the plaintiff. Dickinson *v.* Barber, 9 Mass. 225 (1812); Yeates *v.* Reed, 4 Blackf. (Ind.) 463 (1838). A recent case in Kentucky holds that insanity may excuse a defendant from liability in such case. Irvine *v.* Gibson, 117 Ky. 306, 77 S. W. 1106 (1904). The court quotes from COOLEY, TORTS, 103.

[35] 23 Q. B. D. 168, 177 (1889).

[36] "If an insane person is not held liable for his torts, those interested in his estate, as relatives or otherwise, might not have a sufficient motive to so take care of him

The reasoning applicable to statutes prohibiting the sale of liquor to minors would also apply to those prohibiting the purchase of lottery tickets and the frequenting of brothels and gambling houses, for all of these are police regulations. Statutory rape, however, differs from these, for it is an offense which involves moral turpitude, and is punished by imprisonment. Consequently a punishable state of mind is required.[37] Apart from the intent to use force, if necessary, the same state of mind is necessary for statutory as for common-law rape. Both offenses are covered by the proposed section.

II. Is irresistible impulse a defense under the proposed section? Yes.

It is a fundamental principle of the criminal law that volition is a necessary element of every crime.[38] Stephen forcibly states this principle thus: "No involuntary action, whatever effects it may produce, amounts to a crime by the law of England."[39] Two

as to deprive him of opportunities for inflicting injuries upon others. . . . The liability of lunatics for their torts tends to secure a more efficient custody and guardianship of their persons." McIntyre *v.* Sholty, 121 Ill. 660, 664, 13 N. E. 239 (1887).

[37] Some confusion on this point has arisen because a mistaken belief as to the girl's age has been held to be no defense. (People *v.* Ratz, 115 Cal. 132, 46 Pac. 915 (1896); Holton *v.* State, 28 Fla. 303, 9 So. 716 (1891); State *v.* Newton, 44 Iowa 45 (1876); State *v.* Houx, 109 Mo. 654, 19 S. W. 35 (1891).) The reason for this is the fact that, notwithstanding the mistaken belief, there was a guilty state of mind. "His intent to violate the laws of morality and the good order of society, though with the consent of the girl, and though in a case where he supposes he shall escape punishment, satisfies the demands of the law and he must take the consequences." BISHOP, STATUTORY CRIMES, § 490.

"It is unlawful *per se* to carry on such practices with any female not the lawful wife of the malfeasor, and we think that the offense here, so far as intent is involved, comes within the rule, that a man shall be held responsible for all the consequences of his wrongdoing. By having illicit intercourse with any female he violates the law; should it turn out that the partner in his crime is within the prohibited age, he will not be allowed to excuse himself by asserting ignorance as to her age." Holton *v.* State, 28 Fla. 303, 308, 9 So. 716 (1891). The same reasoning has been applied to the similar case of abduction. (Reg. *v.* Prince, L. R. 2 C. C. 154 (1875); Brown *v.* State, 7 Pen. (Del.) 159, 74 Atl. 836 (1909).) The proposition is well stated in an early Iowa case: "If defendant enticed the female away for the purpose of defilement or prostitution, there existed a criminal or wrongful intent, even though she was over the age of fifteen." State *v.* Ruhl, 8 Iowa 447, 450 (1859).

[38] "Where it [volition] is absent, an immunity from criminal punishment will consequently arise." KENNY, OUTLINES OF CRIMINAL LAW, 40. "It is felt to be impolitic and unjust to make a man answerable for harm, unless he might have chosen otherwise." HOLMES, COMMON LAW, 54.

[39] 2 HISTORY OF THE CRIMINAL LAW, 100.

different reasons for this well-accepted proposition are found in the books. The first is that without volition there is no act.[40] The second is that volition is a mental element that must accompany an act in order to constitute a crime.[41] It is sometimes said that

[40] "External acts are such motions of the body as are *consequent upon determinations of the will.*" 2 AUSTIN, JURISPRUDENCE, 28.

"That is a man's act which he wills to do, exercising a choice between acting and forbearing, and the strongest moral compulsion still leaves freedom of such choice." CLERK & LINDSELL, TORTS, 2 ed., 7.

"An act is the result of an exercise of the will." Gray, J., in Duncan *v.* Landis, 106 Fed. 839, 848 (1901).

"For all legal purposes an act presupposes a human being. It assumes that he is practically free to do such act or leave it undone. It implies that he desires a particular end, and that for the purpose of attaining that end he makes certain muscular movements. These motions thus willed, and their immediate and direct consequences are called, without any minute analysis, an act." HEARN, LEGAL DUTIES AND RIGHTS, 90.

"Jurisprudence is concerned only with outward acts. An 'Act' may therefore be defined, for the purposes of the science, as a 'determination of will, producing an effect in the sensible world.'" HOLLAND, JURISPRUDENCE, 9 ed., 100.

"An act is always a voluntary muscular contraction, and nothing else." HOLMES, COMMON LAW, 91.

"An act is the bodily movement which follows immediately upon a volition." MARKBY, ELEMENTS OF LAW, 6 ed., § 215.

"The movements of a man's limbs when he gesticulates in a troubled dream, or walks in his sleep, are manifest but not voluntary. Perhaps these last are not properly to be called acts at all; in any case they are not on the footing of normal acts." POLLOCK, FIRST BOOK OF JURISPRUDENCE, 137.

"Acts are exertions of the will manifested in the external world." POUND, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW, 453.

"An act is an event subject to the control of the will." SALMOND, JURISPRUDENCE, 4 ed., 324.

"Suppose B takes A's hand and with it strikes C, this is clearly not A's act. Suppose B strikes A below the knee, as a result of which A's leg flies up and strikes C. This is not A's act. Suppose A is suffering from locomotor ataxia, and as a symptom of the disease his foot flies out and strikes C. This again is not A's act. Suppose A, while tossing in the delirium of typhoid fever, flings his arm against C. I do not think any judge would have difficulty in saying that this was not A's act and that he was, therefore, not guilty of a crime. Now, suppose A's hand strikes C because of an uncontrollable impulse, the symptom of mental disease. No distinction can be drawn between these cases, and yet many courts would not allow A a defense in the last case. Others would allow the defense without a consideration of the legal principle involved. When, therefore, it can be shown that the defendant's physical movement which caused the injury in question was due to an uncontrollable impulse he should not be convicted, which conclusion is based upon the most fundamental principle of criminal jurisprudence." From my paper on Tests of Criminal Responsibility of the Insane, 1 J. CRIM. LAW AND CRIMINOLOGY, 394, 400.

[41] "In order that an act may by the law of England be criminal . . . it must be voluntary." 2 STEPHEN, HISTORY OF THE CRIMINAL LAW, 97.

volition is an element of criminal intent.[42] Under both these views a lack of volition due to mental disease is a defense to a charge of crime.

Whenever an impulse is irresistible, there is *ex vi termini* a clear lack of volition, or, as stated by the editor, "the power of choice is negatived by the mental disorder." It follows, then, that the proposed section covers the case of irresistible impulse. So certainly is this so, that there seems no basis for the following statement of the editor in explanation of his contention to the contrary: "If this is not a true analysis of the meaning of the statute, the fact that it is a reasonably possible analysis makes the proposal unsatisfactory as model legislation."

It may possibly be argued at this point that, although an analysis of the section shows that it clearly includes irresistible impulse, this fact is not so obvious and apparent as to prevent some courts from overlooking it. To answer such an argument it is necessary to investigate the reason why courts refused to accept irresistible impulse as a defense when it was first offered, and why some of them continue to do so. It is difficult to see, from an abstract consideration of the question, why courts should have refused to recognize irresistible impulse as a defense, when it so clearly negatives a necessary element of crime, and when they without hesitation recognized other manifestations of lack of volition.[43] A study of the cases,

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[42] "Will is as necessary an element of intent as are reason and judgment." Simmons, C. J., in Flanagan *v.* State, 103 Ga. 619, 626, 30 S. E. 550 (1898).

"This distinct element in criminal Intent consists not alone in the voluntary movement of the muscles (*i.e.* in action), nor yet in a knowledge of the nature of an act, but in a combination of the two, — *the specific will to act, i.e.* the volition exercised with conscious reference to *whatever knowledge the actor has* on the subject of the act." WIGMORE, EVIDENCE, § 242.

[43] See Anonymous Case, Lib. Assis. 287, pl. 17 (1369).

"If there be an actual forcing of a man, as if *A* by force take the arm of *B* and the weapon in his hand, and therewith stabs *C*, whereof he dies, this is murder in *A*, but *B* is not guilty." 1 HALE, P. C., 434.

"If a Man's Arm be drawn by Compulsion, and the Weapon in his Hand kills another, it shall not be felony." Pollard, Serjeant, in Reniger *v.* Fogossa, 1 Plowd. 1, 19 (1550).

"If *A* takes the hand of *B*, and with it strikes *C*, *A* is the trespasser and not *B*." Gibbons *v.* Pepper, 1 Ld. Raym. (1695) 38, 39.

"A man may throw himself into a river under such circumstances as render it not a voluntary act; by reason of force, applied either to the body or the mind." Erskine, J., to jury in Reg. *v.* Pitts, C. & M. 285 (1842).

"I do not know indeed that it has ever been suggested that a person who in his sleep

however, discloses the reasons for such refusal. The most important of these were: 1. It was not believed that the impulse was really irresistible.[44] 2. Impulse, the result of mental disease, was confused with an ordinary outbreak of passion. It was thought that the difficulties of proof were so great that to permit such a defense would be opening the door to impulses not really irresistible.[45]

set fire to a house or caused the death of another would be guilty of arson or murder." 2 STEPHEN, HISTORY OF CRIMINAL LAW, 100.

[44] "But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence — the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint — that forbidding and punishing its perpetration." Bramwell, B., in Reg. *v.* Haynes, 1 F. & F. 666, 667 (1859).

"It is true that learned speculators, in their writings, have laid it down that men, with a consciousness that they were doing wrong, were irresistibly impelled to commit some unlawful act. But who enabled them to dive into the human heart, and see the real motive that prompted the commission of such deeds?" Rolfe, B., in Reg. *v.* Stokes, 3 C. & K. 185, 188 (1848).

"For myself I cannot see how a person who rationally comprehends the nature and quality of an act, and knows that it is wrong and criminal, can act through irresistible innocent impulse." Brannon, J., in State *v.* Harrison, 36 W. Va. 729, 751, 15 S. E. 982 (1892).

"But, if, from the observation and concurrent testimony of medical men who make the study of insanity a specialty, it shall be definitely established to be true, that there is an unsound condition of the mind, — that is, a diseased condition of the mind, in which, though a person abstractly knows that a given act is wrong, he is yet, by an insane impulse, that is, an impulse proceeding from a diseased intellect, irresistibly driven to commit it, — the law must modify its ancient doctrines and recognize the truth, and give to this condition, when it is satisfactorily shown to exist, its exculpatory effect." Dillon, Ch. J., in State *v.* Felter, 25 Iowa 67, 83.

To the same effect see Spencer *v.* State, 69 Md. 28, 40, 13 Atl. 809 (1888); Cunningham *v.* State, 56 Miss. 270, 279 (1879); People *v.* Waltz, 50 How. Pr. (N. Y.) 204, 214 (1874).

[45] "If this were not the law, every thief, to establish his irresponsibility, could assert an irresistible impulse to steal, which he had not mental or moral force sufficient to resist, though knowing the wrongful nature of the act; and in every homicide it would only be necessary, in order to escape punishment, to assert that anger or hatred or revenge or an overwhelming desire to redress an injury, or a belief that the killing is for some private or public good, has produced an irresistible impulse to do a known illegal and wrongful act. So that really there could never be a conviction if the guilty party should assert and maintain an irresistible impulse, produced by some pressure which he could not resist, as a reason for committing a crime. To restrain such impulses is the legal and moral duty of all men, and the protection of society demands that he who yields to them must take the consequences of his acts." Davis, J., in People *v.* Coleman, 1 N. Y. Crim. R. 1, 3 (1881).

3. It was believed that recognition of this defense would be dangerous to society.[46] 4. At the time irresistible impulse was first offered as a defense, the law relative to insanity had become crystallized by prescribing certain mental symptoms as tests of irresponsibility, so that the new symptom, not being included in the tests, was not allowed.[47]

Today the fact that an insane impulse may be truly irresistible is so well established,[48] that no court could gainsay it nor refuse to recognize a distinction between such an impulse and an ordinary outburst of passion. Likewise medical diagnosis of mental disease is so much more accurate and precise that the difficulties of proof are much lessened. Further, the adoption of the proposed statute would do away with all the symptomic tests for determining the criminal responsibility of the insane, so that the courts would be free to apply the ordinary principles of law to the situation. It is submitted that, in the situation just described, it is almost incon-

"It seems to us, however, that in the view suggested the difficulty would be great, if not insuperable, of establishing by satisfactory proof whether an impulse was or was not 'uncontrollable.'" Wallace, J., in State *v.* Bundy, 24 S. C. 439, 445 (1885).

[46] "Indeed, it would seem dangerous to society to say that a man who knows what is right and wrong may nevertheless, for any reason, do what he knows to be wrong without any legal responsibility therefor. The law will hardly recognize the theory that any uncontrollable impulse may so take possession of a man's faculties and powers as to compel him to do what he knows to be wrong and a crime, and thereby relieve him from all criminal responsibility." Valentine, J., in State *v.* Nixon, 32 Kan. 205, 212, 4 Pac. 159 (1884).

"It will be a sad day for this state, when uncontrollable impulse shall dictate 'a rule of action' to our courts." Sherwood, J., in State *v.* Pagels, 92 Mo. 300, 317, 4 S. W. 931 (1887).

"If juries were to allow it as a general motive, operating in cases of this character, its recognition would destroy social order, as well as personal safety." Henderson, J., in Boswell *v.* State, 63 Ala. 307, 321 (1879).

[47] "The medical man called for the defense defined homicidal mania to be a propensity to kill, and described moral insanity as a state of mind, under which a man, perfectly aware that it was wrong to do so, killed another under an uncontrollable impulse. This would appear to be a most dangerous doctrine, and fatal to the interests of society and security of life. The question is, whether such a theory is in accordance with law? The rule, as laid down by the Judges, is quite inconsistent with such a view; for it was that a man was responsible for his actions if he knew the difference between right and wrong." Wightman, J., in Reg. *v.* Burton, 3 F. & F. 772, 780 (1863).

[48] "An impulse is an action committed consciously, but without motive or forethought, and sometimes directly opposed by the will power of the individual." L. C. BRUCE, STUDIES IN CLINICAL PSYCHIATRY, 27.

Krafft-Ebing states that impulsive movements may be due to irritation of the psychomotor centers. TEXT BOOK OF INSANITY, 321.

ceivable that any court of last resort in this country would refuse to allow as a defense a clearly established case of insane impulse.

III. The report of the committee, that drafted the bill under discussion, contained the following statement relative to the scope of section one:

"Under our present law on the subject of insanity the question is whether the defendant by reason of his mental disease shall be held not responsible to the law for the injury he has done. There is another question which is almost equally important, and that is, whether a mental disease, although not of sufficient degree to relieve entirely from responsibility, may not be held to lessen the degree of the crime. For instance, may not a person charged with murder escape conviction for that offense because by reason of his mental disease he did not have the malice aforethought, but be found to have enough *mens rea* to be guilty of manslaughter? This doctrine of partial responsibility has been adopted by some continental countries and has earnest advocates here. The Supreme Court of Utah in a decision rendered last year applied this doctrine. If the proposal of the committee be accepted, partial responsibility follows as a logical conclusion."

The editor states that this will be "holding lunatics for part of their crimes," and objects to the suggestion on the grounds: 1. "It would lead to the result that the law would establish a barometric scale of states of responsibility divided into as many grades as there are degrees of insanity." 2. "To admit such partial responsibility is to make concessions to a science of the past where partial insanity was recognized." 3. "When conflicting evidence of alienists is introduced there will be danger of a compromise by the jury and either a prisoner who is responsible will receive too light a punishment or one who ought to escape altogether will be condemned." The suggestion of the committee does not involve holding a lunatic for part of his crime, as stated by the editor, but for the exact crime committed by him where he has been charged with a severer crime than he committed. Under the present practice a defendant charged with first-degree murder, who sets up insanity as a defense, must be either convicted of the crime charged or entirely acquitted, although the evidence shows that the crime actually committed was murder in the second degree or manslaughter. The first section of the proposed bill would remedy this illogical situation, and under it a defendant charged with murder

in the first degree, whose mental condition was such that all the elements of first-degree murder were present except, for instance, premeditation, when this is required, would be convicted of murder in the second degree, the crime he actually committed.

The idea that a derangement of the defendant's mental processes may be material in determining whether he shall be convicted of a lesser crime than that charged is not a new one in the law. It is constantly being applied when the defense is intoxication.[49] The proposition has been well stated by the Supreme Court of Connecticut:

"Intoxication is admissible in such cases [prosecutions for first-degree murder] not as an excuse for crime, not in mitigation of punishment, but as tending to show that the less and not the greater offense was in fact committed." [50]

Is there any logical or practical reason why this doctrine is not as applicable to the defense of insanity as to that of intoxication? Mr. Justice Gray of the United States Supreme Court stated the doctrine broadly enough to cover insanity as well as intoxication:

"When a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness *or otherwise*,[51] as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury." [52]

This doctrine is also applied in cases where a person kills another at a time when his mental processes have been temporarily affected

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[49] Jenkins *v.* State, 58 Fla. 62, 50 So. 582 (1909); Aszman *v.* State, 123 Ind. 347, 24 N. E. 123 (1889); State *v.* Sparegrove, 134 Iowa 599, 112 N. W. 83 (1907); Terhune *v.* Commonwealth, 144 Ky. 370, 138 S. W. 274 (1911); Cline *v.* State, 43 Ohio St. 332, 1 N. E. 22 (1885); Keenan *v.* Commonwealth, 44 Pa. 55 (1862); People *v.* Peterson, 166 Mich. 10, 131 N. W. 153 (1911).

"Whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute a particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." Cook, Crim. Code of N. Y., 1220. Several courts employ the familiar insanity test — inability to distinguish between right and wrong — as a guide in determining whether a necessary intent is negatived by intoxication. Ryan *v.* U. S., 26 App. D. C. 74 (1905); State *v.* Ford, 16 S. D. 228, 92 N. W. 18 (1902).

[50] Carpenter, J., in State *v.* Johnson, 40 Conn. 136, 143 (1873).

[51] The italics are the present writer's.

[52] Hopt *v.* People, 104 U. S. 631, 634 (1881).

by provocation of certain kinds. In such cases his state of mind, though not amounting to a complete defense, reduces the degree of the offense from murder to manslaughter.[53] The difficulty has been that the courts in dealing with the defense of insanity have been concerned to such a degree in describing psychological phenomena, that they inhibited themselves from seeing the application of general principles of law to the problem before them.

A recent case in Utah [54] adopted the doctrine of partial responsibility contended for here. In this case the defendant was indicted for first-degree murder under a statute requiring that the killing be premeditated. The medical evidence was conflicting, but tended to indicate that the defendant was somewhat unsound mentally, with some symptoms of epilepsy. The defendant was convicted of murder in the first degree. The Supreme Court reversed the conviction on the ground *inter alia* that the jury should have been instructed that the mental condition of the defendant might negative the required deliberation. Regarding this point the court said:

"While the jury found that his condition in that respect was not such as to affect his mental capacity to relieve him from responsibility, yet it may have been such as to affect his mental capacity to coolly deliberate and premeditate on his acts. The jury, therefore, as hereinafter suggested, should have been instructed to consider all of the foregoing

[53] "But if the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of the reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition; then the law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted, very properly regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter." Christiancy, J., in Maher *v.* People, 10 Mich. 212, 219 (1862). To the same effect are the following: Collins *v.* State, 102 Ark. 180, 143 S. W. 1075 (1912); State *v.* Creste, 27 Del. 118, 86 Atl. 214 (1913); State *v.* Hoyt, 13 Minn. 132 (1868); State *v.* Grugin, 147 Mo. 39, 47 S. W. 1058 (1898); State *v.* Kennedy, 169 N. C. 288, 84 S. E. 515 (1915); Commonwealth *v.* Colandro, 231 Pa. St. 343, 80 Atl. 571 (1911); Mitchell *v.* State, 179 S. W. 116 (Tex. 1915).

[54] State *v.* Anselmo, 46 Utah 137, 148 Pac. 1071 (1915). An early Illinois case is to the same effect. Fisher *v.* People, 23 Ill. 283 (1860). In the following cases the doctrine is repudiated: Commonwealth *v.* Wireback, 190 Pa. St. 138, 42 Atl. 542 (1899); Commonwealth *v.* Cooper, 219 Mass. 1, 106 N. E. 545 (1914); Witty *v.* State, 75 Tex. Crim. R. 440, 171 S. W. 229 (1914).

evidence in determining appellant's mental capacity to deliberate and premeditate the homicide. While one's mental condition may not excuse his act, it may nevertheless affect the degree of guilt."

The English Court of Criminal Appeal has gone so far as to hold that an unsound mental condition, which is insufficient to relieve from responsibility, may be ground for reducing the penalty.[55]

The editor states that the proposition now being contended for, which is generally called partial responsibility, involves the theory of partial insanity. If he is using "partial insanity" to describe the condition of one who is not entirely deprived of reason and understanding, then undoubtedly his statement is correct. This is a condition which the science of today, as well as that of the past, recognizes, for it is that of most persons mentally diseased. If, however, he is using the term "partial insanity," as it is often used, to describe a condition such as that set forth by the judges in *McNaughton's Case, viz.*, that of a person insane in one particular and sane as to all others, a condition which probably never existed in fact, then "partial responsibility" as used in this connection in no way involves "partial insanity."

The editor suggested that the adoption of the doctrine of partial responsibility would lead to compromise verdicts when the evidence is conflicting. It is submitted that this result is not nearly so likely to happen as is the acquittal, under the present rules, of a defendant who is shown to have lacked some of the mental element necessary for the full crime charged.[56] Illogical verdicts are more likely to result from illogical than from logical rules.

IV. and V. The fourth and fifth objections of the editor raise the question as to the scope of the proposed section in comparison with the present law on the subject.

In attempting to answer this question, it is first necessary to

[55] Appeal of Holder, 7 Crim. App. R. 59 (1911); Appeal of McQueen, 8 Crim. App. R. 89 (1912).

[56] "The law, as I shall have again more fully to point out, will remain a dead letter, or will be continually ignored by the sympathies of judges, juries, and, I may add, of medical witnesses, unless some practical distinction can be arranged which may enable the responsible insane to undergo some lower degree of punishment than that inflicted on similar delinquents being of sound mind." MAYO, MEDICAL TESTIMONY IN LUNACY, 50.

"Until some middle way is devised by which offenders neither altogether innocent, nor altogether guilty, can have their proper meed of conviction, juries in cases of murder will continue to find verdicts of not guilty on the false plea of insanity." BUCKNILL, UNSOUNDNESS OF MIND, 117.

point out certain fundamental differences between the test of irresponsibility prescribed by the proposed section and the tests now employed. The latter were framed from the medical standpoint, and consist simply of a statement of certain mental symptoms, *viz.*, inability to distinguish between right and wrong, irresistible impulse, and delusion, the existence of one or more of which is treated by the law as a defense. These symptoms represent but a small portion of the phenomena of mental disease, and they bear no necessary relation to the ordinary legal rules for determining responsibility. They are simply obsolete medical theories crystallized into rules of law. In contrast to this situation, the test of the proposed section is based upon one of the most fundamental principles of criminal law, the application of which to the problem of insanity the courts simply lost sight of as a result of their dependence upon the medical profession for all knowledge of mental disease, and the misconceptions entertained by physicians as to the character of this disease. The test of the proposed section is limited to no particular symptoms and embodies no medical theories. The question under the section is whether the symptoms of mental disease, whatever they may be, negative the state of mind required for the crime charged. The proposed test will remain unaffected by divergent views and changing theories regarding the nature and character of mental disease.

The practical method for determining the effect of the enactment of this section into law is to compare it with the existing law in individual states, and this the writer proposes to do. Such a comparison will, however, be facilitated by first discussing the general state of the law regarding "insane delusion." This course is particularly indicated since the editor states that insane delusion "is a species of the genus mistake of fact and excuses on that ground."

No feature of the problem of determining the relation between criminal responsibility and mental disease has caused more trouble than the proper test for insane delusion. From obscurity, so far as the law is concerned, this symptom was brought into the limelight by Erskine in *Hadfield's Case* [57] and as a result of his oratory

[57] "Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity; and where it cannot be predicated of a man standing for life or death for a crime, he ought not, in my opinion, to be acquitted." Speech of Erskine to jury, Hadfield's Case, 27 How. St. Tr. 1281, 1314 (1800).

became for a time the sole test of insanity for the courts.[58] In *McNaughton's Case*, where the defense was delusion, Tindal, Ch. J., instructed the jury:

"If he was not sensible at the time he committed that act, that it was in violation of the law of God and of man, undoubtedly he was not responsible for that act." [59]

When, however, the King's Bench judges, following *McNaughton's Case*, gave their famous answers to the questions of the Lords, they first narrowed their consideration of delusion to those who "suffer from partial delusions only and are not in other respects insane," and they laid down, without appearing to note any inconsistency, two distinct tests relative to such delusions: 1. The victim of delusion is responsible "if he knew at the time of committing such crime that he was acting contrary to law." 2. "He must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real." [60] This second rule here appears for the first time in the law and is the direct result of the premise laid down, that apart from the delusion the person is perfectly sane.

The same confusion characterizes the present law on the subject of delusions. There are at least five different tests for determining when delusion shall be a defense: 1. When the facts of the delusion, if true, would be a defense.[61] This is the ordinary test of mistake of fact, and is the second rule laid down by the judges in *McNaughton's Case*. 2. When the delusion destroys ability to distinguish between right and wrong.[62] 3. When irresistible impulse

[58] "To say a man was irresponsible, without positive proof of any act to show that he was labouring under some delusion, seemed . . . to be a presumption of knowledge which none but the great Creator Himself could possess." Lord Denman to jury in Reg. *v.* Smith (1849), quoted in WILLIAMS, UNSOUNDNESS OF MIND, 5.

"The test of delusion was thus (by Erskine in Hadfield's Case) for the first time laid down, and though in itself delusive from its want of comprehensiveness, its temporary establishment did good service by overthrowing and replacing the unfortunate dogma of Hale." BUCKNILL, CRIMINAL LUNACY, 41.

[59] 4 Rep. St. Tr. (N. S.) 925.

[60] *Ibid.*, 930, 932.

[61] Smith *v.* State, 55 Ark. 259, 18 S. W. 237 (1891); People v. Hubert, 119 Cal. 216, 51 Pac. 329 (1897); State *v.* Merwherter, 46 Iowa 88 (1877); Commonwealth *v.* Rogers, 7 Metc. (Mass.) 500 (1844); Thurman *v.* State, 32 Neb. 224, 49 N. W. 338 (1891); State *v.* Lewis, 20 Nev. 333, 22 Pac. 241 (1889); People *v.* Taylor, 138 N. Y. 398, 34 N. E. 275 (1893); Taylor *v.* Commonwealth, 109 Pa. St. 262 (1885).

[62] People *v.* Willard, 150 Cal. 543, 89 Pac. 124 (1907); Smith *v.* Commonwealth, 1 Duv. (Ky.) 224, 230 (1864); Grissom *v.* State, 62 Miss. 167 (1884).

or inability to distinguish between right and wrong results from the delusion.[63] 4. When irresistible impulse results from delusion.[64] 5. When the wrong done is the product of the delusion.[65]

The first test, involving as it does the proposition that a person suffering from an insane delusion is capable of the same power of reasoning and control as a perfectly sane person, has been many times criticized both by medical [66] and legal writers,[67] the former stating that no such person ever existed.[68] The doctrine was vigorously repudiated in the well-reasoned cases of *Parsons* v. *State* [69] and *State* v. *Jones*,[70] Ladd, J., saying in the latter case: "It is probable no ingenuous student of the law ever read it for the first time without being shocked by its exquisite inhumanity." [71] A recent case in Colorado also refuses to follow the doctrine. The court says:

"A simple illustration discloses its vice. Suppose a man labors under a delusion that a countryman is involved in a traitorous scheme in the capacity of a foreign spy, such delusion so completely possessing his mind that it becomes a foremost and constant thought and actually renders him insane, and under it he kills the other in his belief that it was an act of civic duty." [72]

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[63] "In such a case [insane delusion] . . . there must exist either one of two conditions: (1) Such mental defect as to render the defendant unable to distinguish between right and wrong in relation to the particular case; or (2) the overmastering of defendant's will in consequence of the insane delusion under the influence of which he acts, produced by disease of the mind or brain." Somerville, J., in Parsons *v.* State, 81 Ala. 577, 596, 2 So. 854 (1886).

[64] Flanagan *v.* State, 103 Ga. 619, 30 S. E. 550 (1898); Fouts *v.* State, 4 Greene (Ia.) 500, 508 (1854); Commonwealth *v.* Mosler, 4 Barr (Pa.) 265, 266 (1846).

[65] State *v.* Jones, 50 N. H. 369 (1871); LEWIS, A DRAFT CODE OF CRIMINAL LAW, 246.

[66] RAY, MEDICAL JURISPRUDENCE OF INSANITY, 283; MERCIER, CRIMINAL RESPONSIBILITY, 174; OPPENHEIMER, CRIMINAL RESPONSIBILITY OF LUNATICS, 216; Article by Morton Prince, M.D., 49 J. AM. MEDICAL ASS'N 1643, 1645.

[67] "If the being or essence, which we term the mind, is unsound on one subject, provided that unsoundness is at all times existing upon that subject, it is quite erroneous to suppose such a mind really sound on other subjects." Lord Brougham in Waring *v.* Waring, 6 Moore P. C. 341, 350 (1848).

See also 2 STEPHEN, HISTORY OF CRIMINAL LAW, 160–163; STROUD, MENS REA, 78.

[68] "There is not, and there never has been, a person who labours under partial delusion only, and is not in other respects insane." MERCIER, CRIMINAL RESPONSIBILITY, 174.

[69] 81 Ala. 577, 2 So. 854 (1886).

[70] 50 N. H. 369 (1871). [71] P. 387.

[72] Ryan *v.* People, 60 Colo. 425, 428, 153 Pac. 756 (1915).

The second test is limited to a case where the symptom "delusion" produces the symptom "inability to distinguish between right and wrong." As most persons suffering from delusions know when they do wrong, this test has a very narrow application. It involves the further difficulty of establishing a direct relation between the two symptoms.

Under the fourth test inability to control one's actions is the basis of the defense, and this applies, of course, to one alternative of the third test. Such lack of control or volition is also involved in the fifth, the premise being that the action is the reflexive result of the delusion. Since volition is, as has been shown, a mental element of every crime, the cases included in the third, fourth, and fifth tests are covered by the proposed section.

The facts of *McNaughton's Case* [73] are helpful in comparing the various tests for delusion. In this case the defendant had a delusion that he was being continually followed by certain persons, who spied upon him, pointed at him, and spoke about him. According to the medical testimony in that case the act of shooting Sir Robert Peel was the direct result of the delusion, the defendant believing Sir Robert was one of the persons who were following him.

It was also testified that "the delusion deprived the prisoner of all restraint over his action," [74] and that "a person may labor under a morbid delusion, and yet know right from wrong." [75] There was no evidence that the defendant was unable to distinguish between right and wrong.

Under the first test of delusion the defendant should have been convicted, since, if he had in fact been followed as he believed, this would not justify the killing. The second test would offer no defense, as there was no evidence he did not know right from wrong. Since the killing was the direct result of the delusion, and, as testified, the defendant had no restraint over his actions, his case is covered by the third, fourth, and fifth tests and also by the proposed section.

In discussing delusion, writers on insanity point out that lack of will power is often involved. One of the characteristics of an insane delusion is the fact that the will is powerless to dismiss it, and this same lack of control may characterize resulting muscular

[73] 4 Rep. St. Tr. (N. S.) 847.
[74] *Ibid.*, 922.
[75] *Ibid.*, 921.

activity.[76] Another feature of insane delusion is lack of reasoning power so far as the delusion is concerned, which persists notwithstanding every proof to the contrary, and in spite even of the impossibility of the thing believed.[77] Thus, for instance, if a person is suffering from an insane delusion that he is made of glass, no amount of proof or demonstration to the contrary will have any effect upon the delusion. If he has a delusion that some one in the room is pinching him, he likewise cannot be convinced of the contrary, and if he should strike the object of his delusion, such striking might be more a reflexive movement than the result of a reasoned decision.

The defect of the legal tests regarding delusion, which have been discussed, is that they fail to include all the other symptoms which may accompany it. Delusion is a symptom of different varieties of mental disease and should be considered in connection with the general symptomatology. Thus, for instance, one suffering from acute alcoholic insanity frequently has delusions which may be accompanied by frenzy or delirium. In such a case there may be unconsciousness or complete lack of control.[78] In the persecutory stage of paranoia, where the patient has a delusion that persons are trying to injure or annoy him, a homicidal impulse frequently develops.[79] McNaughton was such a paranoiac, and, as already stated, the medical testimony was to the effect that at the time of the shooting he had no self-control. Delirium and frenzy may also accompany delusions in advanced stages of paranoia.[80]

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[76] "In a more advanced stage of the disease (paranoia), the delusion, whatever it may be, so overpowers the patient that he loses all self-control." TAYLOR, MEDICAL JURISPRUDENCE, 5 ed., 804.

[77] "Insane Delusion is a belief in something that would be incredible to people of the same class, age, education, or race, as the person who expresses it; those beliefs being persisted in, in spite of proof to the contrary, and resulting from a diseased or defective brain action." CLOUSTON, UNSOUNDNESS OF MIND, 185.

"But the fact that these ideas become delusions and acquire a power which even the senses cannot destroy, can only be explained by an inadequate functioning of judgment, dependent on impassioned emotional excitement, clouding of consciousness, and weakness of the reasoning power." KRAEPELIN, CLINICAL PSYCHIATRY, 51. To the same effect see KRAFFT-EBING TEXT BOOK OF INSANITY, 75.

[78] BERKLEY, MENTAL DISEASE, 117, 268.

[79] DERCUM, CLINICAL MANUAL OF MENTAL DISEASES, 142; CHURCH-PETERSON, NERVOUS AND MENTAL DISEASES, 8 ed., 751; MERCIER, TEXT BOOK OF INSANITY, 290.

[80] Chas. K. Mills, Paranoia, PROC. AM. MEDICO-PSYCHOLOGICAL ASS'N, May, 1904.

Under the test of the proposed section all the mental symptoms which accompany delusion would be considered as well as the delusion itself, and if, as a result of these, any necessary mental element of the crime charged is lacking there would be a defense.

(*To be continued.*)

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